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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. Juan Francisco AGUAYO Defendant(s)	Case No. **07mj2500 (WMc)** POINTS AND AUTHORITIES IN SUPPORT OF THE VIDEO DEPOSITION OF, AND SUBSEQUENT RELEASE OF, MATERIAL WITNESS GUADALUPE ESQUIVEL-GARCIA DATE: **November 15, 2007** TIME: **9:30 a.m.** JUDGE: **Honorable William McCurine, Jr.**

I.
INTRODUCTION

The Material Witness, GUADALUPE ESQUIVEL-GARCIA was arrested on or about **October 18, 2007** by agents of the U.S. Customs and Border Protection and has remained in custody since that date.

The witness, by and through her counsel, moves this Court for an Order under 18 U.S.C. Section 3144 and Federal Rule of Criminal Procedure 15 as he has been unable to secure a surety for GUADALUPE ESQUIVEL-GARCIA under the conditions imposed by the government in this matter.

II.
UNDER EXISTING FEDERAL LAW THE COURT IS REQUIRED TO ORDER THE DEPOSITION AND RELEASE OF THESE WITNESSES

18 U.S.C. Section 3144 provides that material witnesses who are unable to comply with any conditions of release have the right to have their deposition taken and thereafter be released:

No material witness may be detained because of inability to comply with a condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice…

Further, Federal Rule of Criminal Procedure 15 (a) provides the procedure basis for this motion for deposition:

If a witness is detained pursuant to Section 3144 of Title 18, United States Code, the Court on written motion of the witness and upon notice to the parties may direct that the witness's deposition be taken. After the deposition has been subscribed the Court may discharge the witness….

The language of 18 U.S.C. Section 3144 is mandatory and requires material witness's deposition and release. Moreover, any ambiguity which exists in 18 U.S.C. Section 3144 must be construed in favor of material witnesses where they were incarcerated indefinitely without being charged with any criminal violation.

In Re Class Action Application for Habeas Corpus on behalf of all Material Witnesses in the Western District of Tezas, 612 Fed.Supp. 940, 945 (1985), the court stated:

As a final matter, this Court is of the opinion that 18 U.S.C. Section 3144 required that an individual incarcerated as a material witness be deposed if certain requirements are met. Without assistance of counsel, it is this Court's belief that deposition of material witnesses rarely go forward and that as a consequence the incarceration of material witnesses is prolonged. This Court is of the opinion that extant procedures not only create the risk of erroneous deprivations of liberty, but also create the risk of unnecessarily prolonged deprivation of liberty……

These instant witness(es) are entitled to due process of the law under the Fifth Amendment. *Id.* 612 Fed. Supp. At 944. Also see *United States v Lincoln* (1980) 502 Fed. Supp. 878, which had a material witness's deposition ordered and then ordered the release of the material witness despite failure of the witness to appear in response to subpoena in the underlying criminal action.

Further, legislative history supports the position that the deposition and release of the material witness is mandatory.

Section 3144: RELEASE OR DETENTION OF A MATERIAL WITNESS, reads (in part):

This section carries forward, with two significant changes, current 18 U.S.C. 3149 which concerns the release of a material witness. If a person's testimony is that it may become impracticable to secure his presence by subpoena, the government is authorized to take such person into custody. A judicial officer is to treat such a person in accordance with Section 3142 and to impose those conditions of release that he finds to be reasonably necessary to assure the presence of the witness as required, or if no condition of release will assure the appearance of the witness, order his detention as provided in Section 3142. However, if a material witness cannot comply with release conditions or there are no release conditions that will assure his appearance, but he will give a deposition that will adequately preserve his testimony, the judicial officer is required to order the witness's release after the taking of the deposition if this will not result in a failure of justice…. 1984 U.S. Cod Cong. And Adm. News, p. 3182.

The Court's attention is further directed to the very recent case of *martin Torres-Ruiz; Rafael Machado-Triana v United States District Court For The Southern District of California* (9th Cir. 1997) 120 F.3d 933 in which our own Ninth Circuit reviewing a Southern District case held that aliens who are detained as material witnesses in alien smuggling prosecutions are entitled to have the district court schedule videotaped depositions because the alien's testimony can be adequately preserved at such procedures and further detention would cause the aliens and their families to continue to suffer extreme unnecessary hardship.

In the instant matter, counsel for the detained material witnesses believe there will be no failure of justice in requiring the deposition, and assert that such is supported by case law. It is true that the defendant has a Constitutional right to confront and cross-examine witnesses against him, but these rights must be balanced against the Constitutional rights of the detained witnesses. In this matter, the defendant is represented by counsel, said counsel and the defendant himself will be notified of the time and place of the deposition and are invited to ask all questions of the witnesses which they believe will further the defendant's case.

III.
CONCLUSION

Under the clear meaning of U.S.C. Section 3144, legislative history and relevant case law, the ordering of deposition and subsequent release of the material witness appears mandatory.

With that in mind, the witness respectfully requests this Court to grant a video deposition of her testimony and then order her remand to the INS for release back to her native country.

DATED: November 5, 2007

/s/ Reza Keramati
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Attorney for Material Witness